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Supreme Court, U.S.
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In the Supreme Court of the United States

No. 727 October Term, 1970

WILLIAM P. SAILER, Individually and as Executive Director of the Philadelphia County Board of Assistance and STANLEY A. MILLER, Individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania,
Appellants

v.

ELSIE MARY JANE LEGER, BERYL JERVIS,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

The following questions are presented by this appeal:

I. Whether Section 432(2) of the Public Welfare Code of Pennsylvania is unconstitutional because it allegedly violates the Fourteenth Amendment, Section 1, to the United States Constitution.

II. Whether the state has an unqualified right in determining what use shall be made of its moneys in the welfare field to restrict such use to citizens.

III. Whether the effect of the Court's decision requiring assistance be granted to destitute aliens is not inconsistent with the intention expressed by the Federal law of prohibiting the entrance or continued residence of those who become public charges?

STATEMENT OF THE CASE

Appellees are members of a class of aliens residing within the Commonwealth of Pennsylvania who would otherwise be eligible for general assistance in Pennsylvania but for the statutory provision providing that such general assistance is payable only to citizens of the United States.

Appellee Elsie Mary Jane Leger entered the United States on May 18, 1965, having come here from Alford, Scotland, to undertake domestic work in Havertown, Pennsylvania. She subsequently entered into a common-law marriage with an American citizen who together with her applied for public assistance. Assistance was granted to her common-law husband but denied to her as she was not eligible for any Federal category of assistance and while eligible in other respects for general assistance she was not a citizen of the United States and such assistance was accordingly denied.

Appellee, Beryl Jervis, a citizen of the Republic of Panama entered the United States on March 1, 1968. She was employed in several positions but subsequently ceased employment due to alleged reasons of health. She thereupon applied for assistance but she also was ineligible for any Federal category of assistance and while eligible in other respects for general assistance she was not a citizen of the United States and such assistance was accordingly denied.

In the Commonwealth of Pennsylvania there are two major public assistance programs. One is known as categorical assistance for which slightly over half of the funds are supplied by the Federal Government. This federally supported program provides aid to the blind, aid to the aged, aid to the permanently and totally disabled and aid to families with dependent children. Aliens, assuming they are eligible in other respects, are eligible for this categorical assistance.

Secondly, Pennsylvania has another assistance program to provide assistance to those who are not eligible for any of the categorical assistance programs but who are otherwise in need. This program is known as general assistance and is financed entirely with state funds and is limited to citizens of the United States.

SUMMARY OF ARGUMENT

Section 432 of the Public Welfare Code of Pennsylvania precludes aliens from receiving general assistance. In restricting general assistance to aliens Pennsylvania is not discriminating with respect to any particular race or nationality, but is applying this prohibition equally to all nationalities. The lower Court did not find this case to involve "invidious discrimination" as condemned by the Supreme Court in *King v. Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968).

Generally, aliens are entitled to the same substantive and procedural benefits of the Fourteenth Amendment as are United States citizens; however there are judicially created exceptions. If a statute creates a distinction and that distinction is based upon a reasonable test in applying it to one group and not another, the courts have readily accepted this distinction. *Dandridge v. Williams,* 397 U.S. 471 (1970).

Also, discrimination in a statute may be upheld if the intent of that statute is found to promote a "Special Public Interest" *People v. Crane,* 214 N.Y. 154, 108 N.E. 427 (1915), aff'd. sub nom. *Crane v. N.Y.,* 239 U.S. 195 (1915). The lower Court indicated that the Supreme Court has overruled the "Special Public Interest Doctrine," however, we submit that this indication is without merit and un-

founded. Furthermore, the lower Court has indicated that the granting of general assistance to United States citizens and not to aliens effects one's "right" to travel; however, the lower Court in reviewing *Shapiro v. Thompson,* 394 U.S. 618 (1969), and the cases upon which the right to travel is predicated should have noted that the application of the right to travel between states was continuously reiterated as belonging to citizens.

In maintaining that Pennsylvania can deny general assistance to aliens, we buttress our view with the understanding of Federal regulations. That Federal law has preempted the field with regard to aliens is not questioned. Several Federal laws grant lesser "rights" to aliens than to citizens. In examining the Immigration and Naturalization Act, 8 U.S.C. 1101, et seq., it is noted that under Section 1251 the Attorney General may deport an alien who has become a public charge. Thus, Congress requires that aliens before entering this country demonstrate their potential to earn a livelihood and Congress expects the states to fulfill that potential. However, tc infer from this section, in which Congress has stated its desire to exclude from the country not only paupers but those who are likely to become public charges, it is not reasonable to conclude that Congress expects the states to provide aliens with welfare out of state funds when an alien no longer can maintain his very person. The requirement that a state grant assistance to alien public charges is in effect thwarting the effectiveness of the Federal regulation which permits the Federal Government to deport an alien who has become a public charge.

The far-reaching effect of mandating that Pennsylvania grant general assistance to aliens would in effect place a question upon the validity of all statutes which favor citizens and not aliens. Furthermore, if the Court accepts the lower Court's opinion that the "Special Interest Doctrine" has been overruled sub silentio, it will be difficult to justify any discriminatory statute no matter how valid the reasoning behind it may be that favors citizens and not aliens.

Indeed, all statutes regulating stricter control or granting lesser privileges to aliens would require review and this result may occur because the Court below equated this country's time-honored opportunity to earn a living with the "right" to receive welfare.

ARGUMENT

I. Does Section 432(2) violate the equal protection clause of the Fourteenth Amendment?

It must be made abundantly clear at the outset that this case does not involve and the lower Court did not find that it involved the "invidious discrimination" as condemned by the Supreme Court in *King v. Smith,* 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968). The state is not discriminating here with respect to any particular race or nationality but its prohibition applied with equal force to all nationalities. The distinction which the state concedes is that between citizens of the United States on the one hand and aliens, regardless of race, creed or national origin on the other.

The parties to this proceeding agreed at the outset that as a general proposition, the word person in the Fourteenth Amendment includes resident aliens, and that therefore aliens are entitled to the same substantive and procedural benefits of the Amendment as citizens. *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). However, there are certain well-recognized judicially established exceptions to the general proposition.

The Supreme Court further observed in *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 420 (1948), that aliens are protected by 42 U.S.C. 1981

(formerly Section 41 of the National Act, 8 U.S.C. §41) which provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis supplied.)

It is patently obvious that the Court in the instant case was not dealing with a discriminatory statute for the security of persons or property and therefore the relevance of the Federal law to this proceeding appears somewhat ambiguous. Whether public assistance is deemed a privilege or a statutory right of entitlement it is not property within the sense of that term as used in the statute and the Supreme Court has not so held insofar as we are able to ascertain.

The lower Court seemed greatly concerned over finding or rather failing to find what in its opinion would be a "compelling state interest" in the language of the Supreme Court in *King v. Smith,* supra, and *Shapiro v. Thompson,* infra. It is submitted, however, that the Supreme Court has now made it clear in the recent case of *Dandridge v. Williams,* 397 U.S. 471 (1970), that the "compelling state interest test" and the procedural results of that test, "strict judicial scrutiny", are reserved for those cases based upon suspect criteria or invidious discrimina-

tion and that the rational or reasonable test is appropriate in all other situations in which constitutionality comes into question with respect to welfare legislation.

The Commonwealth's position is that the type of preference in question has been countenanced by the Supreme Court and that no decision has been found which by innuendo or otherwise has overruled the "Special Public Interest" doctrine.

II. Whether the State has an unqualified right in determining what use shall be made of its moneys in the welfare field to restrict such use to citizens?

The "Special Public Interest Doctrine" was perhaps best set forth in the opinion rendered by Judge Cardozo in *People v. Crane,* 214 N.Y. 154, 108 N.E. 427 (1915), aff'd. sub nom. *Crane v. New York,* 239 U.S. 195 (1915).

Crane upheld a New York statute which prohibited aliens from working on construction projects paid for with government funds.

The Court in *Crane* noted that discrimination was involved and so stated.

> ". . . To disqualify aliens is discrimination, indeed but not arbitrary discrimination, for the principle of the exclusion is the restriction of the resources of the State to the advancement and profit of the members of the State. Ungenerous and unwise such discrimination may

be, it is not for that reason unlawful." *People v. Crane,* supra, at 429.

The lower Court has found an overruling *sub silentio* of this decision by *Truax v. Reich,* 239 U.S. 33 and *Takahashi v. Fish and Game Commission,* supra.

We would submit that in finding, thus, the lower Court has read something into these latter decisions which is just not there.

First of all, Justice Hughes in the *Truax* case specifically recognized the Special Public Interest Doctrine as an exception to the ordinary tests of discrimination when he stated, "This discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, *the enjoyment of which may be limited to its citizens as against both aliens and citizens of other states.*" *Truax v. Reich,* supra, at 39 and 40. See also *McCready v. Virginia,* 94 U.S. 391 (1877).

It was only after recognizing that the statute in question dealt with private enterprise that Justice Hughes commenced the discussion of whether there was a violation of equal protection.

Furthermore, Justice Black also recognized the principle thirty-two years later in *Takahashi v. Fish and Game Commission,* supra. While the claim of California that the preservation of fish within its three mile border was of "Special Public Interest" was rejected by the Court, there is no doubt that the Supreme Court recognized the existence of such a

doctrine as Justice Black stated in the opinion, "However, the Court there [Truax case] went on to note that it had on occasion sustained state legislation that did not apply alike to citizens and noncitizens, the ground for the distinction being that such laws were necessary to protect special interest either of the state or the citizens as such."

It is difficult to conceive how the lower Court found in *Shapiro v. Thompson,* 394 U.S. 618 (1969), or *Goldberg v. Kelly,* 397 U.S. 254 (1970), an indication that the Supreme Court has overruled the Special Public Interest Doctrine which is basically that a state, absent a special state interest, is not permitted to intrude upon an alien's right to enter and abide by statutes which discriminate against them as opposed to citizens in the conduct of ordinary private enterprise; the state as proprietor of the resources of the citizens of the state may favor its own citizens in the disbursement of those resources. This distinction in fact was recognized and apparently approved by the Supreme Court as recently as 1960 in *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961).

It has been argued by the plaintiffs that Pennsylvania citizenship requirement is invalid because it places an undue burden on the right to travel. Plaintiffs rely on *Shapiro v. Thompson,* 394 U.S. 618 (1969). The statute under attack in *Shapiro v. Thompson,* supra, required persons to maintain a one year residency in the State before becoming eligible for welfare assistance. The court asserted that the effect of the waiting-requirement created two classes of needy resident families which are indistinguish-

able from each other except that one is composed of residents who have resided within the Commonwealth for a year or more, while others have resided less than a year. In determining that this distinction is invalid because it precludes nonresidents from welfare benefits, the court stated at 612:

> "This court long ago recognized that the nature of our Federal Union and our constitutional conceptions of personal liberty unite to require that all *citizens* be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." (Emphasis supplied.)

The proposition was also briefly stated by Chief Justice Taney in the *Passenger Cases,* 7 How. 283, 492, 12 L. Ed. 702, 790 (1849):

> "For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all *citizens* of the United States; and, as members of the same community, must have the right to pass and repass through every part of the land without interruption, as freely as in our own states." (Emphasis supplied.)

In *Shapiro v. Thompson,* supra, the court continuously emphasized at 612, 613, 615 and 616 that the right to travel between states belongs to citizens. Never did the court include any other group of people within the realm of this constitutional right. It continually reiterated that the fundamental right of interstate movement belongs to citizens.

The court in *Shapiro v. Thompson,* supra, indicated that restrictions upon this movement are permissible *only* if it is necessary to promote a compelling governmental interest. The court did not affirmatively define a compelling governmental interest; however, it reviewed and rejected appellant's argument that a mere showing of a rational relationship between the waiting period involved and state objectives sought will suffice to justify the classification; the court also indicated that the statute did not serve the objective asserted by appellants; furthermore, the court determined at 615 that the "immigration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally 'impermissible.' " The court therefore concluded at 638 that the classification in *Shapiro v. Thompson,* supra, "touches on the fundamental right of interstate movement, and that its constitutionality must be judged by the strict standard of whether it promotes a 'compelling interest' " which it did not find; consequently, this regulation violated a constitutional right.

Shapiro v. Thompson, supra, was, however, dealing with what the court found constituted invidious discrimination as has been previously noted herein. In this case it was not alleged, nor did the lower Court find an invidious discrimination existing, and thus the theory of finding or the necessity for finding a compelling state interest as enumerated in the *Shapiro* case or the *King v. Smith* case, 392 U.S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128 (1968), is entirely inappropriate as a test in the instant situation.

Judge Wood stated in his dissenting opinion in the lower Court at 38:

> "We note in passing that contrary to the plaintiff's assertations the 'compelling state interest' required to justify state legislation related to interstate movement in Shapiro v. Thompson, supra, does not apply to cases involving welfare legislation." *Dandridge v. Williams,* 397 U.S. 471 (1970).

While the state has conceded the distinction drawn between citizens and aliens the clearly obvious purpose of conserving general assistance assets for United States citizens is founded upon a reasonable basis. *Dandridge v. Williams,* 397 U.S. 471, 25 L. Ed. 2d 491 concluded at 501 and 502:

> " 'In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426."

In his dissent in the lower Court, Judge Wood referred to *Dandridge v. Williams*, supra, and asserted at 39, note 8:

> "The constitution may impose certain procedural safeguards upon systems of welfare administration . . . (citing Goldberg) *But the constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.*" (Emphasis of the Court.) 397 U.S. 471, 487 (1970).

III. Whether the effect of the decision of the lower Court requiring general assistance be granted to destitute aliens is not in fact inconsistent with the expressed intent of Federal law of prohibiting the entrance or continued residence of those who are or become public charges?

That Federal law has preempted the field with regard to aliens is not questioned. The appellees here contended in the lower Court that Pennsylvania's general assistance statute conflicts with Federal law and therefore was invalid. The lower Court did not rule on the contention.

In his dissenting opinion, supra, Judge Wood stated at 41 and 42:

> "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle

to the accomplishment and execution of the full purposes and objectives of Congress". 312 U.S. at 67.

> "In the light of these standards I cannot conclude that Pennsylvania's citizenship requirement is preempted by federal law. [Hines v. Davidowitz, 312 U.S. 52 (1941)] and the other cases relied upon by the plaintiffs were concerned with requirements under state law which would hinder, obstruct, or harass aliens in such a way as to interfere with the federal scheme of regulation. Pennsylvania's citizenship requirement does not regulate the conduct of aliens, but rather excludes them from an affirmative benefit which the state may or may not decide to dispense to its own citizens. If the state had no welfare program at all, federal laws relating to aliens would not be obstructed; it is difficult to see how federal laws are obstructed any more because the state decides to give welfare payments to citizens." (Citation provided.)

In further determining that there is not a conflict, Judge Wood said in his dissent, supra, at 40:

> ". . . The state as proprietor of the resources of the citizens of the state may favor its own citizens in the disbursement of those resources. . . . Being mindful of the recent admonition of the Supreme Court that the 'Fourteenth Amendment gives the federal courts no power to impose on the states their views of wise economic or social policy,' I would not overturn what I consider to be a settled precedent."

It was the position of appellants that Pennsylvania's citizenship requirement does not regulate the conduct of aliens or in any way hinder, obstruct or harass aliens but rather only excluded them from an affirmative benefit which the state may or may not decide to dispense to its own citizens. As was observed by Judge Wood in the event that the State had no welfare program Federal laws relating to aliens would not be obstructed; it would therefore be difficult to conceive how Federal laws are obstructed any more because the state decides to give welfare payments to its citizens.

Judge Wood also noted in his dissenting opinion at 33, note 2, that aliens lawfully admitted to the country under the authority of Acts of Congress have the right to "enter and abide" in the various states. The Court in *Truax v. Raich*, 239 U.S. 33, 42 (1915), indicates that the alien's right to "enter and abide" stems from Federal law and not from the Fourteenth Amendment and could therefore be restricted by Federal statute. Therefore, concludes Judge Wood at 34, note 2: "It is doubtful that this right to enter and abide of aliens is the same in all respects as the right of citizens to travel between states." In reviewing *Truax v. Raich*, supra, it is submitted that the authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. Since the Federal Government has the right to admit aliens as well as to exclude them, it is submitted that the Federal Government may restrict their movement from one state to another by deporting them if they become paupers within five years of their admission to our borders; therefore, it must necessarily follow

that the right to enter and abide is not synonymous with the right to travel which was found to belong to citizens in *Shapiro v. Thompson,* supra.

In *Takahashi v. Fish and Game Commission,* 334 U.S. 409 (1947), at 415, the Court in reviewing the right of an alien to "enter and abide" relied on *Truax v. Raich,* supra, indicating that the privilege to "enter and abide" in any state carried with it the right to work for a living in the common occupations of the community. The Court in *Takahashi,* supra, stated that to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. We concede, both in *Takahashi,* supra, and *Truax,* supra, that an alien possesses the right to work upon entrance into our union; however, it is our contention that once an alien enters, abides, and works within our borders and then for whatever reasons can no longer maintain his very existence, it is not mandated upon the State of Pennsylvania to supply this alien with welfare assistance to continue his existence within our borders. *Takahashi,* supra, indicated at 418:

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, *the period they may remain,* regulation of their conduct before naturalization, and the terms and conditions of their naturalization." (Emphasis ours.)

It is conceded that under the Constitution the states do not possess such powers; they can neither add to

nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States or the several states. The Court in *Takahashi*, supra, states at 419:

> "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with its constitutional derived Federal power to regulate immigration have accordingly been held invalid."

An examination of the Immigration and Naturalization Act, 8 U.S.C. 1101, et seq., demonstrates that while the Court in *Truax* and *Takahashi* was correct in holding that a state's refusal to allow aliens an opportunity to earn a living clearly contravened federal policy, it also confirms that Pennsylvania's policy of denying general assistance to aliens does not. Section 1182(a)(7) denies admission to those aliens who have physical ailments which may affect their ability to earn a living. Section 1182(8) denies admission to aliens who are paupers. Section 1182 (15) denies admission to aliens, who in the opinion of the Consular officer, or in the opinion of the Attorney General, are likely at any time to become a public charge. Section 1183 allows the Attorney General to require an alien to post a bond prior to being admitted in case he later becomes a public charge. Section 1251 allows the Attorney General to deport an alien under certain conditions who has become a public charge. Thus, Congress by requiring that aliens before entering this country demonstrate their potential to earn a livelihood and expects

the states to allow these persons to fulfill that potential. However, to infer from these same sections, in which Congress has stated its desire to exclude from the country not only paupers but those who are likely to become public charges, that Congress expects the states to provide aliens with welfare out of State funds would be presumptuous to say the least.

Carried one step further, the lower Court has now ordered that the State grant to all aliens within its borders, regardless of whether they arrived yesterday or 10 years ago, general assistance. In effect, have they not said you need no longer worry about Federal statutes regarding paupers for the states are now required by the Constitution to grant you assistance ergo; you cannot therefore be a pauper as you are guaranteed at least this source of income. Such is clearly not the intention of Federal law but appears to be diametrically opposed to it.

The lower Court has also by its holding cast grave doubt on a number of other state statutes which were cited to it in which a distinction is drawn between aliens and citizens. Hunting and fishing privileges are licensed at different rates depending on whether alien or citizen; Workmen's Compensation is paid only at 50 per cent rate to aliens. True, these statutes although called to the Court's attention were not at issue in the cause and their validity or lack thereof was not decided. It follows by necessary inference, however, that if the Special Public Interest Doctrine is, as the lower Court intimated it was, overruled sub silentio the grounds upon which these statutes are based is indeed shakey.

Finally, assuming arguendo that it was the Supreme Court's intention to overrule all authority to the contrary dealing with an individual's right to earn a living, whether in public works, fishing or any other private enterprise, it is still difficult to imagine that the Court was equating this country's time-honored tradition of the opportunity to earn a living with the "right" to receive welfare.

CONCLUSION

The questions involved are of paramount importance to the Federal Government as well as to the State Governments. The decision of the lower Court appears to overrule a long line of cases decided by this Court and also casts grave doubt upon the constitutionality of any statute which makes any distinction between aliens and citizens. It is a common known fact that aliens are denied the right to vote in the United States; if the failure to grant a largesse is a denial of equal protection it might also follow that the denial of another right granted only to citizens is subject to the same attack.

Respectfully submitted,

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